LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
SEP 21 1950
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1950.

No. 9.

BERNICE B. FERES, as Executrix under the Last Will and Testament of RUDOLPH J. FERES, Deceased,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

THE REPORTER COMPANY, INC., New York City—1950

Index.

TABLE OF CASES:

STATUTES:

MISCELLANEOUS:

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 9.

BERNICE B. FERES, as Executrix under the Last Will and Testament of Rudolph J. Feres, Deceased,
Petitioner,
vs.
THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinion in the Court Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 177 F. 2d 535 (Record, p. 8). The opinions of the United States District Court for the Northern District of New York are unreported, which appears in the record, page 2.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on the 4th of November, 1949. Petition for certiorari was filed January 26th, 1950. Certiorari was granted by this Court on March 13th, 1950. Jurisdiction was based upon Sections 1254 and 2101 of Title 28, United States Code. This case presents a situation where the United States Court of

Appeals for the Second Circuit has rendered a decision in conflict with another United States Court of Appeals on the same matter. See *Griggs v. United States*, 178 F. 2d 1.

Statement of the Case.

This action was brought under the Federal Tort Claims Act to recover for the alleged wrongful death of the petitioner's testator, Deceased was a First Lieutenant in the United States Army and died in a fire that swept the barracks in which he was quartered at Pine Camp, New York, on December 10th, 1947, after hostilities had ceased and removed from the combatant areas (R. 5).

The decedent was the husband of the petitioner who was appointed executrix and authorized to maintain the action (R. 5).

The complaint alleged (R. 6) that the agents of the United States were negligent in assigning the deceased to unsafe quarters because of a defective heating plant which caused the fire, and were further guilty of negligence in the supervision of the fireguard. Other specifications of negligence are alleged including failure to provide a safe place for the decedent to be quartered.

The complaint was filed August 19th, 1948, and no answer was filed by the Government. There was no trial and a motion made on the complaint to dismiss the action on November 8th, 1948. The order dismissing the complaint was entered February 10th, 1949, and on the 5th of April, 1949, appeal was taken to the United States Court of Appeals for the Second Circuit. The United States Court of Appeals on November 4th, 1949, rendered a decision affirming the District Court.

Federal Statute Involved.

The Federal Tort Claims Act is Title IV of Public Law, 601—79th Congress, Chapter 753, Second Session, 60 Stat. 843, *et seq.* (United States Code, Title 28, Section 921, *et seq.* On 1 September 1948, while this action was pending, the new Judicial Code became effective. In it the provisions of the Act were recodified as Sections 1346 (b), 2401 (b) and 2671-2680. Since the rights of litigants of impending actions are preserved as they were under the prior law (Section 2 [b] of Act of 25 June 1948, P. L. 773, 80th Congr., 2d Sess.), we will refer to the Sections in the Act as originally enacted. (See Appendix).

Questions Presented.

In *Brooks v. U. S.*, 337 U. S. 49, 93 L. Ed. 1200, this Court held that the Government is liable under the Federal Tort Claims Act to a soldier on furlough for injuries then tortiously inflicted by other military personnel. The question presented here is:

> Is a soldier sleeping in barracks removed from combatant areas after hostilities have ceased under the protection of the Federal Tort Claims Act so that his widow and dependents may recover damages for his death caused by the negligence of the employees of the United States Government acting within the scope of their employment?

In the *Brooks* case, this Court answered in the affirmative the question as to whether members of the United States armed forces were under the coverage of the Act. This Court, however, expressly reserved the question as to whether the Act applied to accidents which were incident to the soldier's military service, stating by way of dicta (p. 52):

> "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."

The question presented, therefore, is whether the Federal Tort Claims Act made a distinction as to coverage depending upon the soldier's particular activity at the time of the injury or death and whether if the soldier is disqualified while a soldier from suing under the Act is this disqualification grafted over to his widow and dependents.

Summary of Argument.

The Federal Tort Claims Act as written gives the District Court jurisdiction of petitioner's claim. The legislative history shows that the purpose of the Federal Tort Claims Act was to relieve Congress from considering thousands of bills introduced each year for claims against the Government arising out of multitude of circumstances, including those of the armed services and their dependents. The history of the enactment shows that Congress had considered members of the armed forces. The exception that the Court below has read into the Act was once excluded by Congress. The Act is a general waiver of immunity intended to do away with the old practice of waiving sovereign immunity by special Act of Congress. It follows the trend of the last 25 years of the Government waiving sovereign immunity as their activities expand.

Since a soldier is on duty at all times as a member of the armed forces until discharged or separated from the service, the Act creates no distinction upon the right of the plaintiff to sue depending upon the particular activity of the soldier at the time of the Act complained of, except those of the combatant nature. Since this Court

has decided that a soldier on furlough is entitled to sue under the Act, it necessarily follows that all other soldiers, so long as they have the status of the soldier, are likewise entitled to sue under the Act. Assuming for reasons of military discipline, a soldier should not sue while a member of the armed forces, this disability is not grafted to his widow and children, the petitioners here.

The fact that the Government has given to soldiers and their dependents certain *privileges* by other Federal statutes cannot be considered a substitute to or an exclusion of the *right* granted under the Federal Tort Claims Act.

The decisions relied upon by the Court below are those under an unrelated Act passed more than 25 years ago which Acts were limited waivers of immunity and not the broad general waiver of immunity as the Federal Tort Claims Act.

ARGUMENT.

POINT I.

The Federal Tort Claims Act gave the District Court jurisdiction of "any claim" against the United States. Since the petitioner was not excluded by any of the exceptions, the District Court below had jurisdiction of her claim for the negligent death of her husband caused by an act or omission of an employee of the Government. Neither the act as written, its legislative history or avowed purpose permitted the Court below to read into the act an exception that was not there.

The Act, Section 410, gives the District Court exclusive jurisdiction to hear, determine and render judgment without a jury "on any claim against the United States,

for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred."

In Section 402, an employee of the Government is defined as follows:

> "(b) 'Employee of the Government' includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

This Court, in *Brooks v. United States*, 337 U. S. 49, unequivocally stated (p. 51):

> "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. Sec. 421. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress

did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions makes this plain."

(a) Under familiar canons of instructions, the Act does not need interpretation and should be administered as written.

The proper viewpoint is well expressed, with citations of numerous authorities, in 50 Am. Jr., pages 204-207, as follows:

> "A statute is not open to construction as a matter of course * * *. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning * * * the Court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the Courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

Mr. Justice Holmes, in *United States v. Pulaski Co.*, 243 U. S. 97, stated (p. 106):

> "There is a strong presumption on that the literal meaning is the true one, especially as against a construction that is not interpretation, but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent. * * *"

Another familiar canon of statutory construction that when the meaning of the statute is plain the sole function

of the Courts is to enforce its terms. See *Caminetti v. U. S.*, 242 U. S. 470, 485; *Osaka Shosen Kaisha Line v. U. S.*, 300 U. S. 98, 101.

In *Equitable Life Assurance Society v. Pettus*, 140 U. S. 226, 233, 35 L. Ed. 497, 500, 11 S. Ct. 822, 825, the Court said:

> "This construction is put beyond doubt by section 5986 which, by specifying four cases—in which the three preceding sections 'shall not be applicable' necessarily implies that those sections shall control all cases not so specified."

The specific exclusions, therefore, carry the implication that all claims not thus excluded may be successfully asserted.*

(b) *The legislative history precludes the construction put upon the Act by the Court below.*

This Court in the *Brooks* case stated (p. 50):

> "More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935.[2] All but two[3] contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped.[4] What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans Act of (June 7) 1924—43 Stat. 607, c. 320, 38 U. S. C. A. Sec. 421, 11 F. C. A. title 38, Sec. 421, compensation for injury or death occurring in the first World War. H. R. 181, 79th Cong. 1st Sess. When H. R. 181 was incorporated into the Legislative Reorgani-

* Volume 33, American Bar Association Journal (p. 962):

"When these exceptions are considered, we are left in the field of negligence of governmental agents in (a) the operation of motor vehicles; and (b) the maintenance, operation, and control of highways, bridges, public lands, building, and structures of all kinds."

> zation Act, the last vestige of the exclusion for members of the armed forces disappeared. See also Note, 1 Syracuse L. Rev. 87, 93, 94.

Congress specifically considered and deliberately rejected an exception having exactly the same effect as that which the Court below now writes into the Act. This is to be seen undeniably in the following circumstances:

The original predecessor of the Federal Tort Claims Act was a bill, H. R. 7236, introduced in the 76th Congress. It, like the present law, provided for general waiver of the Government's immunity to tort suits and in it there were listed substantially the same twelve exceptions and exclusions which appear in the present Act. But, in addition to these, there was at that time another exception proposed which would have excluded from the coverage of the Act:

> "Any claim for which compensation is provided by the * * * World War Veterans' Act of 1924, as amended."

The theory of this exception, just as the Government now urges in support of the lower Court's decision in the present case, was that the World War Veterans' Act of 1924, as amended, confers certain governmental benefits, such as the right to compensation payments, upon all persons injured while in the armed services of the United States, and therefore such persons should not also have the benefit of a general statute permitting tort suits against the Government. The clear purpose and effect of the proposed exception was thus to exclude all members of the armed services from rights of action under the contemplated statute. Conversely, it seems to have been considered obvious (see Congressional Record, Vol. 86, Pt. II, 76th Congress, 3d Sess., 1940, pp. 12015-12032, and see also footnote, p. 212, *Jefferson v. United States*, 74 F. Supp. 209), that under the proposed statute's general opening of the way to tort suits against the Gov-

ernment, members of the armed services would be able to sue like all other persons unless some such exception was expressly written into the statute. Though debated, the bill was, of course, not enacted by the 76th Congress.

In the 79th Congress, the same bill, retitled H. R. 181, was again introduced with all its exceptions including the additional, or thirteenth, exception quoted and discussed above. Congress again considered the bill, *struck out of it the exception in question*, and enacted the remainder as the present Federal Tort Claims Act.

The Federal Tort Claims Act, as its history partially outlined above indicates, was no hasty or ill-considered piece of legislation. The Court below was in error to assume that when Congress gave its attention to the subject of exceptions or exclusions from the Act and carefully etched out twelve such exceptions, it overlooked and failed to mention a thirteenth exception which it really intended. Certainly and above all, the Court below erred when it disregarded the fact that Congress did consider such thirteenth exception. And for the Court below to write the effect of that exception back into the statute after Congress deliberately and specifically struck it out, is unjustifiable.

In the Report of the Joint Committee pursuant to H. Con. Res. 18, 79th Congress, 2d Session, House Report No. 1675, it is stated at page 25:

> "'2. Delegation of Private Claims.
>
> "Recommendation: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the Federal Government; and that Government agencies and departments be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams.

"'Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.

"Long delays in consideration of claims against the Government, time consumed by the Claims Committees of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.

"The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. We, therefore, recommend that *all claims for damages* against the Government be transferred by law to the United States Court of Claims and to the United States District Courts for proper adjudication.

"We further recommend that private pension bills and other bills dealing with purely local and private matters, including the authority to construct bridges over navigable streams, be delegated to the proper agencies of government for final determination." (Italics ours.)

In the Senate Report No. 1400 to accompany S. 2177, at pages 18 and 19, it is stated:

"Part 2. Provisions Applicable to Both Houses.

"Section 121. Private bills banned.

"This section bans private bills, resolutions and amendments authorizing or directing the payment of property damages for personal injuries *or death or for pensions;* the construction of bridges across navigable streams; or the correction of military or naval records. It is provided, however, that the provisions of this section shall not apply to private bills or resolutions conferring jurisdiction on the Federal courts to hear, determine, and render judgment in connection with private claims

otherwise cognizable under the Federal Tort Claims Act if the claim accrued between January 1, 1939, and December 31, 1944, the last day being the day before the effective date (for the purpose of accrual of claims) of the Federal Tort Claims Act. This will permit consideration of bills or resolutions covering claims going back for a period of 6 years and would seem to be ample to prevent any inequities." (Italics ours.)

Page 29:

"Title IV—Federal Tort Claims Act.

"This title waives, with certain limitations, governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this title."

Therefore it seems evident to us that Congress wanted to rid itself of the great number of private bills for relief of military personnel and their families presented at every session.

Several cases arising under the Act have been interpreted as its primary purpose or intention to relieve Congress of the burden of dealing by private acts tort claims and construction put upon the Act by the Court below and the Government defeats that purpose.

United States v. South Carolina State Highway Dept., 171 Fed. 2d 893.
State Farm Mutual Liability Insurance Co. v. United States, 172 Fed. 2d 737.

The position now assumed by the Government in litigation under the Act is at variance with the original purpose of the Act as so indicated by Congress.

For the first time in the history of this country has there been peacetime conscription* and the present activities of the Federal Government reach corners never dreamt of by the founding fathers. It should not seem unusual that co-related with this extension of Government activity that there should be assumed Government liability and waiver of immunity from suit.

The Act is a general waiver of immunity intended to do away with the old practice of waiving sovereign immunity by special act of Congress. It follows the trend of the last twenty-five years of waiving Government immunity as Government activities multiply.

The proper view of the Act we submit is as stated in *Griggs v. United States*, 178 F. 2d, page 3:

> "With deference to the views of the learned judge, in the *Jefferson* case, we fail to find anything in the context of the Act or its legislative history justifying judicial limitation upon the claims of servicemen. As pointed out in the *Brooks* case, there were eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two of which contained provisions expressly exempting claims of members of the armed forces. When, however, the Congress finally came to confer jurisdiction of the District Courts over tort claims against the United States, it conspicuously omitted to exclude claims growing out of a government-soldier relationship. We think the only logical conclusion is that it deliberately refrained from doing so. If the result of its omission to exempt such claims leads to dire consequences and absurd results, it is for Congress and not this Court to provide rational limitations."

* "Armed forces of 2,300,000, still goal for the year" (N. Y. Times, Sunday, Sept. 10th, 1950).

POINT II.

Since a soldier is on duty at all times, irrespective of his particular activity or non-activity, the decision in the *Brooks* case is controlling here.

Since this Court in the *Brooks* case has held that a soldier on furlough is entitled to sue, they have recognized that the Act creates no distinction dependent upon the particular activity of the soldier at the time of the act complained of (except those in the exceptions). The decision that a soldier on furlough is covered by the Act carried with it the necessary implication that all soldiers must be likewise covered.

While he has the status of a soldier, his particular activities or non-activities may vary from time to time. He may be performing the duties of a soldier of the widest variety, from training* to combatant service. A soldier may be on furlough, as the soldier in the *Brooks* case, or he may be in the hospital, unconscious on the operating table, as the soldier in the *Jefferson* case (178 Fed. 2d 518, cert. granted March 13th, 1950, No. 381), and the soldier in the *Ostrander* case (No. 33, October Term, 1950, application for certiorari to the Second Circuit Court is pending undecided before this Court), or he may be a soldier sleeping in the barracks far removed from combatant areas, as the soldier in this case. The soldier's status is that of a member of the armed

* In Skeels v. U. S. 72 Fed. Supp. 372, combatant activities were construed to mean actual conflict. If Congress intended to exclude activities arising out of training activities, it would have been easy to have said so for they did exclude combatant activities as well as those arising out of duties of a discretionary nature.

forces until separated by discharge or retirement, if he obeys its laws and regulations. Once inducted into the army, his status is that of a soldier and not of a civilian and hence a decision in the *Brooks* case should be decisive of the issue here.

Is it to be assumed that Congress intended to include soldiers covered by the Act while on furlough or some other similar status but not when sleeping in a barracks or performing some other activity? The error of the Court below is in assuming that the Act created the distinction between a soldier who was on active duty and one who was not. There is nothing in the wording of the Act that creates this distinction; on the contrary, the exceptions where the Act does not apply are specifically set forth in meticulous detail in Section 421 thereof.

What the Court below overlooked is that a soldier is on duty at all times irrespective of his particular activity at the time.

There is no doubt whatever that a soldier on furlough is on active duty. He receives army pay and allowances (see The Judge Advocate General School's Text No. 3, "Military Affairs," p. VIII-25), is subject to the Articles of War and courts-martial (see Manual for Courts-Martial, U. S. Army, 1949, par. 10, pp. 10-11), and is entitled to army hospitalization and medical care (see second Fourth Circuit decision in *Brooks* case, 176 F. 2d 482). If injured while on furlough and discharged from the army, he is entitled to benefits under the Veterans Act only because he was disabled in line of duty while on *active* duty. Active duty status is one of the prerequisites of the Veterans Act of 1924, as amended, which provides for the payment of disability benefits (38 USCA 701 [a]) to:

> "(a) Any person who served in the active military or naval service and who is disabled as a

> result of disease or injury or aggravation of a pre-existing disease or injury incurred in line of duty in such service."

If fatally injured while on furlough, his legal representative is entitled to the six months' death gratuity (10 USCA 903 and 456a). These benefits inure to the soldier on furlough, as was illustrated in the *Brooks* case, solely because he was on active duty and was injured "in line of duty." The theory is set out in *Moore v. U. S.*, 48 Ct. Clms. 110, 113:

> "As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. * * * The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command."

For the historical development of the rule see the Judge Advocate General's School Text No. 3, "Military Affairs" (1943 ed.), pp. X-26 to X-34.

In the Court below the Government contended in its brief at page 16:

> "The Supreme Court has stated that while on leave, a serviceman 'is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses.' *United States v. Williamson*, 23 Wall. 411, 415. The leave 'is a favor extended for his sole accommodation' to permit him to 'enjoy a respite from military duty.' *Foster v. United States*, 43 C. Cls. 170. 'A leave of absence or a furlough is a favor extended. A soldier cannot have a furlough forced on him.' *Hunt v. United States*, 38 C. Cls. 704, 710."

We, therefore, argue that if a furlough is merely a favor extended to the soldier it cannot be concluded then that it is such a radical change in his status as to again make him a civilian for the purpose of the Federal Tort Claims Act. The Government argued that much when in its brief before this Court in the *Brooks* case it stated (p. 18):

> "The soldier is subject to military discipline even while at play, and his desertion is a serious crime, punishable at times by death."

(p. 29):

> "Even in the absence of such statutory extension, it has been recognized that a serviceman is entitled to compensation benefits for injuries sustained while he was away from duty and on leave, inasmuch as the military relationship is continuous and is not broken because of a pass. 'A pass granting temporary leave for recreational purposes cannot change this status any more than a leopard can change its spots. It would be *dehors* the principles of military science if it were otherwise.' *Globe Indemnity Co. v. Forrest*, 165 Va. 267, 272."

The Court of Appeals for the District of Columbia in *Wham v. United States*, 180 Fed. 2d 38, cited the case at bar but refused to follow it, pointing out the same error as we have.

In that case a police officer of the District of Columbia was injured while on duty by a Treasury Department vehicle, driven by a Treasury Department employee. An action was brought under the Tort Claims Act. The policeman was eligible for various special benefits under Federal statutes but the Court refused to apply the doctrine of the Circuit Court below in the case at bar or the doctrine of the *Dobson** and *Bradey** cases, hold-

* See Point IV infra where these cases are discussed.

ing that the decision by this Court in the *Brooks* case controlled.

The District of Columbia Court of Appeals said that there was no reason to draw a distinction between a soldier on furlough and a soldier acting in the line of duty because on furlough soldiers enjoy the same benefits generally as those on active duty, therefore, there could be no distinction between a policeman on duty or off duty.

See also:

Santana vs. The U. S., 175 Fed. 2nd 320.

What had disturbed some of the Courts below is interference with military discipline and like matters if a soldier was permitted to sue his government. These considerations are not present here because the soldier is not suing. His widow is the plaintiff, the petitioner here.

We may make a general analogy to a person in a jail who undergoes a change in his civilian status while incarcerated as punishment for the crime found guilty of.

Very often penal statutes disable a convict from suing while under the disability of a sentence. The Courts are universal in holding that such disability does not carry over to the convict's family or assignee and that the disability is personal to the convict and is removed when he is no longer under the consequences of his criminal sentence.

See:

Green v. State of New York, 278 N. Y. 15.
Bamman v. Erickson, 259 A. D. 1040, 21 N. Y. S. 2d 40.

Concededly, the plaintiff was and is not a member of the armed forces. Even if we assume that her husband

was disqualified from suing his employer, the Government, while the relationship of a soldier existed, there is no statute or rule of law which grafts that some disqualification upon her and deprives her of the right to sue under the Federal Tort Act like any other citizen.

POINT III.

The privileges granted by Federal statutes are not a substitute to the rights granted by the Federal Tort Claims Act.

The chief contention of the Government is that Congress must have intended to exclude members of the armed services (and their wives and dependents) because of the growth over the years of a system of pensions and benefits. This argument does not square up fully upon analysis. A reading of the several statutes mentioned does not seem to indicate that the allowances granted thereby are "rights," or that they will be allowed in all cases, especially where the claim is that there is recurrence of a condition or injury received in time of war. 38 U. S. C., Sections 501 (a) and 501 (a-1).

Certain principles govern the determination whether the additional disability results from an injury or aggravation of an existing injury and the claimant must establish causation. 38 C. F. R. Cum. Supp., Section 2.1123 (b).

Although the Government may have been liberal in one sense, in a system of benefits and pensions, the system is not so all-inclusive and complete as to lend support to the contention that it is a complete substitute for a claim under the Federal Tort Act.

Furthermore, the argument of the Government completely ignores the proposition that there is no vested right to a pension or other benefit which is merely a bounty from a grateful government which Congress could recall, limit, destroy or change (*In re Lindquist Estate*, 144 Pac. 2d 438, 154 Pac. 2d 879, cert. denied 325 U. S. 869, 89 L. Ed. 1988).

When the *Brooks* case was remanded to the Circuit Court after the decision of this Court, Chief Judge Parker pointed this out (176 F. 2d 482), stating (p. 484):

> "We recognize that prospective disability payments are uncertain in that the government may withdraw or decrease them at any time * * *"

The argument of the Government is that a *dependent* of a soldier has no *rights* under the Federal Tort Claims Act because the soldier may have some *privileges* under some other acts enacted at different times and for totally unrelated circumstances and purposes.

The proceeds of death actions are distributed according to different plans than the distribution of death or disability benefits under the Federal statutes for relief of veterans. Much depends upon who is the survivor, widow, child, parent, etc. For example, see Section 133, Decedent Estate Law, State of New York, Legislative Document No. 65C, New York Legislature, 1949.

Finally, as this Court observed in the *Brooks* case, 337 U. S. 49 (p. 53):

> "Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 USCA Sec. 701, 11 FCA title 38, Sec. 701, indicate no purpose to forbid tort actions under the Tort Claims Acts. Unlike the usual workmen's compensation statute, e. g. 33

USCA Sec. 905, 10 FCA title 33, Sec. 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. *United States v. Standard Oil Co.*, 332 U. S. 301, 91 L. ed. 2067, 67 S. Ct. 1604, indicates that, so far as third party liability is concerned. Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 USCA Sec. 757, 2 FCA title 5, Section 757. Thus *Dahn v. Davis*, 258 U. S. 421, 66 L. ed. 696, 42 S. Ct. 320, and cases following that decision, are not in point. Compare *Parr v. United States* (CCA 10th Kan.), 172 F. 2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so. Compare 31 USCA Sec. 224b, 9 FCA title 31, Sec. 224b, specifically repealed by the Tort Claims Act, Sec. 424 (a). In the very act we are construing, Congress provided for exclusiveness of the remedy in three instances, Secs. 403 (d), 410 (b), and 423, and omitted any provision which would govern this case."

POINT IV.

The authorities relied upon by the Court below are not controlling.

The Circuit Court below in affirming specifically relied upon *Dobson v. United States*, 27 Fed. 2d 807, cert. d. 278 U. S. 653, and *Bradey v. United States*, 151 Fed. 2d 742, cert. d. 326 U. S. 795, as well as *Jefferson v. United States*, 77 Fed. Supp. 706 (cert. granted and argument follows case at bar).

This Court in alluding to the *Dobson* and *Bradey* cases stated in *Brooks v. United States*, 337 U. S. 49 (p. 52):

> "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradey v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. Sec. 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U. S. 198."

Argument was made in the *Brooks* case that Congress was aware of the decision in the *Dobson* and *Bradey* cases and, therefore, when they drew the Federal Tort Act molded its language in accordance with that awareness. In footnote 4 in the *Brooks* opinion, this Court easily disposed of that contention, stating:

> "Other bills after those mentioned in note 2 above, also omitted this exception. See, e. g., HR 5373, 77th Cong. 1st Sess.; HR 1356, 78th Cong. 1st Sess. This has nothing to do with 'congressional awareness' of the *Dobson* decision (CCA 2d N. Y.), 27 Fed. 807, and *Bradey* decision (CCA 2d N. Y.), 151 F. 2d 742, both *infra*. The present Tort Claims Act contains exceptions which would have been specifically covered by those cases. Sec. 421 (d)."

The decisions in the *Dobson* and *Bradey* cases are founded upon acts whose legislative history and purpose are no parallel to the Federal Tort Claims Act. The danger in drawing general conclusions from decisions under other statutes is admirably set forth by Mr. Jus-

tice Frankfurter in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

Not only is there a serious difference of wording in the acts interpreted in the *Dobson* and *Bradey* cases, but it must be important to bear in mind that the Federal Tort Claims Act represented a marked departure by the United States with respect to the waiving of sovereign immunity. It is the adoption of the trend of the last twenty-five years or more. The Federal Tort Claims Act is a comprehensive Act or general waiver of immunity. The acts interpreted in the *Dobson* and *Bradey* cases were special acts waiving immunity under certain conditions and to a limited extent.

The same view of the scope of the act has been taken by the Circuit Court of Appeals for the Ninth Circuit in an opinion filed on April 8, 1948, in *Employees' Fire Insurance Co., et al., v. U. S.*, Civil Action No. 11743, 167 F. 2d 655. In reversing a District Court decision that an insurance company had no right of subrogation under the act, the Circuit Court of Appeals said:

> "The words of the Act indicate a clear and sweeping waiver of immunity. * * * The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions."

United States v. Aetna Cas. & S. Co., 94 L. ed. 151 (p. 161):

"In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

CONCLUSION.

The judgment appealed from should be reversed and the case remanded for a trial upon the merits.

Dated, September 15th, 1950.

Respectfully submitted,

MORRIS POUSER,
Attorney for Petitioner,
Office & P. O. Address,
101 Washington Avenue,
Endicott, New York.

DAVID H. MOSES,
Of Counsel.

LEXOW & JENKINS,
70 Lafayette Avenue,
Suffern, New York.

APPENDIX.

TITLE IV—FEDERAL TORT CLAIMS ACT

Part 1—Short Title and Definitions

Short Title

Sec. 401. This title may be cited as the "Federal Tort Claims Act."

Definitions

Sec. 402. As used in this title, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided,* That this shall not be construed to include any contractor with the United States.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Part 3—Suits on Tort Claims Against the United States Jurisdiction.

Sec. 410. (a) Subject to the provisions of this title, the United States District Court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States District Courts for the territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

Part 4—Provisions Common to Part 2 and Part 3 One-Year Statute of Limitations.

Sec. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such

claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to Part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to Part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to Section 410 of this title, if it would otherwise expire before the end of such period.

Exceptions

Sec. 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., Title 46, Secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., Title

46, Secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

Exclusiveness of Remedy

Sec. 423. From and after the date of enactment of this Act, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under Part 3 of this title, and the remedies provided by this title in such cases shall be exclusive.